

FACT SHEET N°5

DEMYSTIFYING TRADE IN SERVICES: A STRATEGIC GUIDE FOR ACP EPA NEGOTIATORS

SYNOPSIS

This Analytical Note is part of a series of Fact Sheets designed to overview and assess the development implications of the Economic Partnership Agreements (EPAs), which the EU is currently negotiating with 76 countries in Africa, the Caribbean and Pacific (ACP). This Fact Sheet seeks to increase the understanding of the substantive issues at stake in the negotiations, thereby enabling negotiators, policy-makers, lobbyists and campaigners to make informed decisions about how to engage with EPAs. Fact Sheet No.5 deals with trade in services. Trade in services has been portrayed as one of the complicated areas in the EPA negotiations. In simplifying the legal principles and rules, as well as concepts that govern international and regional trade in services, the Fact Sheet specifically aims at enhancing effectiveness of ACP negotiators in EPA negotiations

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1. INTRODUCTION

1. There is no hard and fast way to define what services are. In many cases, the easiest way to define services would be to juxtapose with what they are not: goods. Services would typically involve more intangible tradables: for example, when one goes to a bank and makes a transaction, the bank would be providing banking/financial services. When one makes a telephone call, the operating company is providing telecommunication services. When one goes to a hospital for treatment, the State, or whichever facility owner, is providing medical services through doctors, nurses, pharmacists or paramedics.

2. In many cases, trade in services has an inextricable link to trade in goods: when you go to the pharmacy to purchase medicines, retail, distribution services are being provided as part of the process of procuring medicines; a product-a good. When you produce agricultural commodities, in order to get these to the market, a functioning distribution and transport service sector is necessary. Traders need functioning financial, telecommunication or computer related services to bolster smooth running of productivity and connectability to markets. Looked at from this viewpoint, it is difficult, if not impossible, to operate in the commercial, or social sense, without trade in services.

3. African Caribbean and Pacific (ACP) countries are in the process of negotiating a reciprocal trade Agreement on services with the European Union (EU). This is aimed at increasing the level of market access, and national treatment benefits available for both parties (over and above what is available under the WTO), through further elimination of limitations and conditions attached thereto. From the outset, it is important to note that while the service sector is of critical importance and presents great economic potential to ACP countries, they are not key players in international trade in services, and remain net importers of services. On the other hand, the EU is one of the world's most competitive suppliers of services. Many questions have been raised about the economic and social benefits for ACP countries, of signing a reciprocal trade Agreement on services with the EU.¹ Rather than tackle a question that has been addressed through a lot of literature, this Fact Sheet focuses on what it is that ACP countries will have to contend with, in terms of rules, principles and

¹ See "Development at cross roads: the Economic Partnership Agreement negotiations with Eastern and Southern African countries on Trade in Services". South Centre Research papers 11. Also see "Why inclusion of services in EPA negotiations is problematic: Legal and development implications". South Centre Policy Brief no.10. On line available <http://www.southcentre.org>.

concepts on international and regional trade in services, so as to better inform a negotiation in which they already engage. In so doing, it discusses key general concepts in the multilateral framework governing trade in services, provides an overview of the role of services in ACP economies, contextualises the EU-ACP relationship on services from Lomé to Cotonou times, discusses the rules and principles that constitute WTO compatibility of services economic integration agreements (EIAs), and then concludes.

2. THE WTO'S GENERAL AGREEMENT ON TRADE IN SERVICES (GATS): A MULTILATERAL FRAMEWORK

a) Most Favoured Nation, National Treatment and Progressive liberalisation

4. The World Trade Organisations' (WTO) General Agreement on Trade in Services (GATS) defines services against the mode in which they are provided. Services can be provided from the territory of one Member into any other Member (mode 1-cross border), in the territory of one Member to the service consumer of any other Member (mode 2-consumption abroad), by a service supplier of one Member through commercial presence in the territory of any other Member (mode 3-commercial presence), and by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member (mode 4-presence of natural persons).

5. In order for one to understand regional trade Agreements and the rules applicable thereto, comprehension of rules that govern multilateral trade in services is a must. For those countries that are WTO Members (about 151 across the globe, with many others in accession negotiations), all other trade Agreements they get into in any other fora have to be WTO compatible. As such, the WTO' GATS becomes indispensable. The GATS is the only legal instrument that governs multilateral trade in services. It lays out trade rules, to which WTO Members must adhere, in conducting, managing and regulating their trade in services within and beyond borders.

6. According to Article II of the GATS, any treatment that a WTO Member accords to any country, shall be extended immediately and unconditionally to all other WTO Members' services and services suppliers, such that no Member is treated in a less favourable manner than others. This is the *most favoured nation* (MFN) principle, which guarantees, at least in theory, equal access to international services markets for all WTO Members. Overall, the MFN is an important principle, and attraction, for countries in joining the WTO, because even if you give a non-Member better treatment, MFN requires that this is extended to all other WTO Members, and not vice versa. There is a limited number of exceptions to the MFN principle permitted under the GATS, such as the provisions in the Annex on MFN exemptions, which allowed Members, prior to the entry into force of the GATS, to list exemptions in accordance therewith. In

general, MFN exemptions are frowned upon by the WTO Membership, and their elimination is very much part of the Doha Development Agenda's GATS negotiations. Another increasingly important departure from the MFN principle lies in the proliferation of preferential trade Agreements that have a services trade component. Article V of the GATS provides that benefits extended among partners through such Agreements need not be extended to other WTO Members. About 58 EIAs under Article V of the GATS have been notified to the WTO.² The rules governing EIAs are discussed later in the Fact Sheet.

7. The GATS also contains a *national treatment* provision, according to which, Members must accord to services and service suppliers of any other Member, in respect to all measures affecting the supply of services, treatment no less favourable *than it accords its own like services and service suppliers*. Importantly, this obligation only applies to services sectors in which Members have made specific commitments in a schedule, and is subject to any conditions that may be inscribed in Members' schedules. In other words, national treatment is negotiable under the GATS, because the sectors to which it applies, and the degree of national treatment applied in these sectors, are, and continue to be, determined through negotiations amongst Members. The GATS does not contain *a priori*, any obligation to open any sectors, and to provide unconditional market access and national treatment. It is up to Members to decide which sectors they are willing to open up (commit) to other Members, and the conditions on such access. When a national treatment condition is made, in the absence of any exceptions, such as through preferential trade Agreements, it applies on an MFN basis.

8. In the absence of inscription in a Member's schedule, the GATS prohibits maintenance of the following: limitations such as numerical quotas, monopolies, exclusive service suppliers, economic needs tests (ENTs), limitations on the total value of service transactions or assets in the form of numerical quotas, limitations on the total number of services operations, and on the number of natural persons that may be employed in a particular service sector.³

9. Negotiations under the GATS are guided by the principle of *progressive liberalisation*. In Article XIX: 1, Members agree to achieve progressively higher levels of liberalisation, in successive Rounds of negotiations; through reduction or elimination of the adverse effects of measures on trade in services, and the provision of effective market access. For example, in the Uruguay Round, countries made market access and national treatment commitments. The expectation is that in the Doha, and successive Rounds, more commitments will be made. The principle of *progressive liberalisation* is meant to allow WTO Members to be in charge of the pace, extent, scope and timing of the liberalization commitments that they may choose to make in the GATS. In the making of

² See Regional Trade Agreements gateway. On line available, <http://www.wto.org>.

³ For other limitations see Article XVI: 2 of the GATS.

commitments on the basis of the principle of *progressive liberalisation*, developing countries are given flexibility to open fewer sectors, liberalise fewer transactions, progressively extend market access in line with their development situation, and to attach conditions aimed at increasing their own participation in international trade, when making market access available to foreign services suppliers.⁴ However, developing countries would have to inscribe in their schedule, any such limitations and conditions. Additional flexibility is given to least developed countries (LDCs)-by recognizing their difficulty in making commitments, and in general, accepting the results of negotiated specific commitments.⁵

b) Schedules of commitments

10. According to Article XX of the GATS, when Members make a decision as to the sector that they wish to commit for market access and/or national treatment, they list such a commitment, and the conditions attached thereto, in a *schedule of commitments*, which, by annexure to the GATS, is an integral part thereof.⁶ The type of information that is placed in a schedule includes limitations and conditions on market access, national treatment, and additional commitments. Information may also extend to the timeframe for implementation of such commitment, and the date of entry into force of such commitment.

Example of a schedule of commitments: Health services

Sector or sub sector	Limitations on market access	Limitations on national treatment	Additional commitments
Medical services	1) Unbound 2) None 3) None, other than the number of foreign companies registered each year may be limited depending on the total supply of doctors. 4) Unbound, except as indicated in the horizontal section	1) None 2) None 3) None 4) Unbound	

11. In the above *schedule of commitments*, Members utilise the word *unbound* to indicate that they do not undertake a commitment with regard to market access

⁴ See Article XIX: 2 of the GATS.

⁵ See Article IV: 3 of the GATS. Also see The Hong Kong Ministerial Declaration, WT/MIN (05)/DEC, which excludes LDCs from the obligation of making commitments in the Doha Round of negotiations.

⁶ See Article XX: 1 (3) GATS.

or national treatment, respectively: in other words, they reserve the right to maintain or adopt any measures that are inconsistent with these provisions. The word *none* is used to indicate that there are no limitations on market access or national treatment, so that no measures inconsistent with these provisions can be maintained or adopted in the specific sector. In the table above, under the market access column, no commitment exists for cross-border supply (mode 1), although the market is fully liberalized in mode 2. In the case of mode 3, the market is liberalized on the condition that *the number of foreign companies registered each year may be limited depending on the total supply of doctors*. In mode 4, the market is closed *except as indicated in the horizontal section*; a section normally used by countries to list measures that apply to all sub-sectors contained in the entire schedule of commitments.⁷

12. In the national treatment column, no limitations exist in modes 1, 2 and 3, meaning that the country above commits to treating foreign services and service suppliers just like its own local ones in medical health services. In mode 4, the country does not commit to treat natural persons providing medical health services like local medical health service providers.

c) Binding nature of schedules and the difficult roll-back process

13. According to Article XXI of the GATS, Members can only modify a commitment inscribed in their schedules after a three year lapse from the time the commitment comes into force.⁸ Article XXI requires that the modifying Member notifies its intent to modify the schedule to the Council for Trade in Services (CTS) at least three months before the intended date of implementation of such modification or withdrawal,⁹ and enters into negotiations with any Member who claims that the modification/withdrawal will affect their trade. The objective of the negotiations is to reach agreement on necessary compensatory adjustment. The idea is to maintain, overall, a general level of mutually advantageous commitments not less favourable to trade than was available in the withdrawing/modifying Member's schedule prior to such withdrawal/modification. Any compensatory adjustment is applied to all WTO Members on an MFN basis. In the event of failure to agree on compensation, any affected Member can request arbitration. If the modification goes on without respect for the arbitral award, an affected Member who has participated in such arbitration may modify or withdraw substantially equivalent benefits applying

⁷ It is important to note that markets may be open on the basis of unilateral liberalisation as well. In such a case, other national rules would apply thereto. For WTO purposes though, schedules of commitment and the conditions attached thereto are what is guiding and binding.

⁸ See Article XXI: 1: (a) of the GATS. In cases where Members wish to modify or withdraw a specific commitment on the basis of an emergency safeguard measure (ESM), and subject to the finalisation of the negotiations on ESMs, the Member has to notify the CTS of its intention to modify or withdraw the commitment after a period of one year justifying why the modification cannot wait for the three year lapse period provided in XXI: 1 (a). Also see Article X: 2 of the GATS.

⁹ See Article XXI: 1: (b) of the GATS.

solely to the initial modifying Member. This applies irrespective of the MFN principle.

14. The rules make it clear that once a commitment is made, it is very difficult to go back on it. While the door is not closed for Members of an EIA on services to decide how they will treat modification/withdrawal of commitments, it is most likely that the EU would want to retain the certainty, predictability and lock-in effect of market access, and especially national treatment commitments, through difficult roll-back rules. As such, any commitments that ACP countries make, either on market access or national treatment, in the EPAs will, most likely, be difficult to roll-back on, without going through difficult compensatory processes. Therefore, prudence dictates that ACP countries make well thought decisions as to whether, and in which sectors, to liberalize services with the EU.

3. THE ROLE OF SERVICES IN ACP COUNTRIES

15. There are difficulties in measuring, with precision the actual contributions of trade in services to ACP economies. The intangible nature of services, as opposed to goods, makes it difficult to use certain policy instruments, like tariffs, to quantify and assess contributions to individual economies, which can then be aggregated to regional blocks. There is also the traditional problem of non-stockability of services, which many times requires simultaneous production and consumption, making quantification difficult.¹⁰ The highly informal nature of many services activities, particularly in developing countries, makes it even more difficult to calculate its contributions, as well as the large amount of *behind the border* protection, mainly through discriminatory regulatory practices, which are all difficult to quantify. Overall, the generation, and verification of statistics on trade in services is a continuing challenge. In cross border supply (Mode 1) for example, the fluidity of this movement makes it almost impossible to quantify. Although some statistics can be tracked in cases of consumption abroad (mode 2), from the consumers of tourism and education, these may not be the only sectors in which consumption abroad is utilized as a supply mode. There may also be a cross-link between tourism and medical services, and the difficulty in capturing exact contributions of each sector remains. In the case of setting up commercial presence, (mode 3), foreign direct investment statistics are an information source, although even these do not cover the entire picture, as there may be firms that are not necessarily part of foreign subsidiaries-therefore not mode 3 in the strict sense, and yet governments would normally include these in their calculations. Presence of natural persons (mode 4) is even harder to capture.

¹⁰ However, due to technological developments, this characteristic may not prove true. For example, information can be stocked in USB keys and CR ROMs.

16. All the above notwithstanding, there are some studies which, as at 2003, revealed that the share of services measured as a percentage of gross domestic product (GDP) calculations for ACP countries, falls in the range of 50 per cent.¹¹ Key sectors within the region are travel/tourism, transport, financial services and telecommunication services, with leading contenders being Caribbean countries. The services sector is also a leading provider of employment in the ACP region.

17. Many of the ACP countries traditionally rely on agriculture for their export earnings. The service sector plays an important role, not only in developing and enhancing competitiveness in the agriculture sector; through creation of necessary infrastructure such as in distribution, transportation, financial and telecommunications services, but also by providing scope for diversification. The need for diversification of the agricultural sector gets pressing owing to the high volatility of prices of agricultural commodities in international markets, large levels of subsidies in rich countries on these same products (making ACP products non-competitive), or the inevitable phase-in of full liberalisation in their typical preferential EU markets; owing either to WTO liberalisation, the phase-out of the Cotonou preferences, or the extension of preferential treatment by the EU to other developing countries. (for example under the Enabling Clause; where the EU, through its so-called Generalised System of Preferences (GSP), including the GSP+, extends preferential market access to developing countries including those in Latin America, for some commodities. Against this background, many ACP countries are aware of the need to find complementarity in the services sector contributing to, and being a fundamental part, of national development strategies.

a) Social functions: The strategic role of health services

18. Every country needs a well functioning health service system that can provide services which keep the population in good health, so that they can engage in commercially meaningful activities. This entails availability of institutions (public referral and private hospitals, clinics, pharmacies), affordable health care including drugs, availability of a trained and skilled pool of health professionals including doctors, nurses, midwives, para-medics, and an efficient regulatory framework to ensure the quality and distributional aspects of the service. In a situation where world health pandemics continue to claim lives at untold proportions, particularly in sub-Sahara Africa, the need for governments to provide health services, bearing in mind obligations to provide universal access to basic services, is clear.

Box 1: Health services in the GATS

In the GATS, health services broadly include hospital services and other

¹¹ Source World Development Indicators 2003, quoted in Special and Differential Treatment in Post Cotonou services Negotiations, ODI, 2004.

human health services. Other sub-sectors that fall within professional services, but are related to health, include medical and dental services; services provided by midwives, nurses, physiotherapists and para-medical personnel. Health services will typically be provided via consumption abroad (mode 2), presence of natural persons (doctors, nurses) to provide medical services (mode 4), or commercial presence (mode 3).¹² The provision of services for foreign international consumers, (mode 2) brings foreign exchange for the health sector, as well as potentially more from indirect convergences such as medical-tourism currency. Remittances sent home from health professionals abroad can improve recipients' living standards. Provision of medical services through mode 4 can also assist countries with the financial capacity to meet universal access to basic services obligations. It is possibly for some of these reasons that WTO Members, like the EU, make commitments in their GATS schedule of commitments, under the sub-sector of professional services, relating to: (a) medical, dental and midwives services in mode 4¹³ (b) Veterinary services¹⁴ (c) nurses, physiotherapists and paramedical personnel¹⁵ and (d) pharmacists. In the case of provision of medical services through the set up of commercial presence, the increased employment opportunities for local health providers, as well as more exposure to new technologies and therefore greater skills enhancement, is clear.

b) Commercial functions: Professional services

19. Professional services extend to commitments in the sub sectors of legal services, accounting, auditing and bookkeeping, taxation, architectural, engineering (including integrated engineering), urban planning and landscape, medical and dental services, veterinary services, services provided by midwives, nurses, physiotherapists and para-medical personnel. A well functioning professional service sector is a critical must-have for any smoothly run economic activity.¹⁶ These services provide economic gain for those engaged in them, contributing to social stability through the trickle-down effects on their families, either through ability to pay for education, health and other services, or to invest in other sectors, such as agriculture or industry. Professional services also contribute to the creation of a hub of expertise that is not only useful in the context of private entities, and profit making, but also in the context of persons that can be employed by governments, whose professional expertise allows them to increase efficiency and competitiveness in government departments. These services also create a pool of economic activity within a country, the expenditures from which allow governments to rely, at least in part, for planning and implementing its national policy objectives.

¹² There is also scope for mode 1 provision for example through telemedicine.

¹³ CPC 9312, 93191.

¹⁴ CPC 9329.

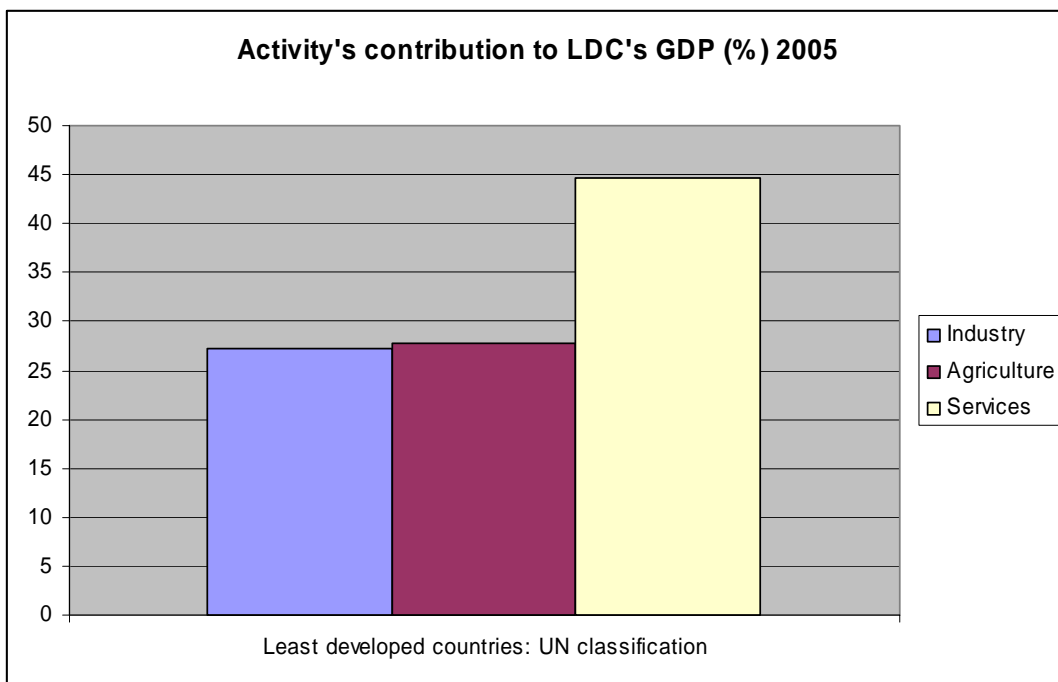
¹⁵ CPC 9319.

¹⁶ The importance of other categories of business services such as computer and related services, research and development, and others, is also worth mentioning.

c) The role of services in least developed countries (LDCs)

20. The role of services in LDCs is worth special mention, since many ACP countries are also LDCs. In these countries, the role of services transcends pure commercial significance, contributing to eradication of poverty, owing to their social, cultural, and welfare-enhancing functions, human development in the form of essential services, such as water, health, sanitation, education, as a hub of economic activity such as in tourism, and through the linkages, both forward and backward, created with other sectors such as manufacturing, investment, agriculture, and others. The contribution of services to GDP in LDCs is on the ascendancy, as compared to agriculture and industry. The table below reflects the situation as at 2005:

Table 1: Contribution of services to LDC's GDP



Source: *World Development Indicators (WDI) database online, 2006.*

21. The multi-faceted role that services play in LDCs is well summarized in Paragraph 2 of the Modalities for the Special Treatment of LDCs in WTO GATS negotiations, which emphasizes the importance of services in the achievement of social and development objectives such as improving universal availability and access to basic services, and in ensuring sustainable development, including its social dimension.¹⁷

¹⁷ See TN/S/13.

d) Region-specific examples of the role of services in ACP countries

22. In the **Economic and Monetary Community of Central Africa (CEMAC)**, an annual growth rate of 6.5 per cent is experienced in the service sector, contributing to GDP formation, with predominant sectors being distribution and transportation services. These sectors amount to an average of 65 per cent of the production of services in the sub-region.¹⁸ The share of services exports in total regional exports amounts to 8 per cent (compared to goods exports which represent 92 per cent). Measured against the total services imports which amount to about 45 per cent, the region can be defined as a *net importer of services*.¹⁹ This assertion is corroborated by country-specific examples, such as in the Central African Republic (CAR), where IMF data indicates that the contribution of the services sector to GDP has been decreasing from 28.4 per cent in 1996/9 to 0.9 per cent in 2004/5.²⁰ In the case of tourism, between 1988 and 2004, the sector contributed large receipts which had remained relatively constant averaging US\$4.7million per annum. However, as other services exports declined, tourism exports now contribute about 20 percent to services exports in the CAR.

23. In the **Economic Community of West African States (ECOWAS)**, Nigeria registers a contribution of 33.3 per cent of the services sector to GDP, with key sectors being finance and insurance, as well as the energy sector arising from natural endowments of oil.²¹ In Senegal, the services sector generates at least two-thirds of GDP, and is expected to continue growing, especially in the area of telecommunications.²² Cote d'Ivoire has a diversified financial sector²³. Cape Verde, not a WTO Member, has a particularly strong share in the region's transportation, travel and other commercial services.²⁴ Overall, the ECOWAS region registered an average growth rate of 4% according to UNCTAD statistics in the period between 1996 and 2000. However, it still imports more than its exports services.

24. For the countries that constitute the **Eastern and Southern African (ESA)** economic partnership Agreement (EPA) negotiating group, the services sector contributes up to an average of 50 per cent to GDP²⁵. However, their own participation in international trade in services through exports remains low,

¹⁸ Report of ILEAP workshop on trade in services negotiations, and trade facilitation in the Central African Economic and Monetary Union (CEMAC). On line available <http://www.ileap-jeicp.org/>.

¹⁹ Ibid.

²⁰ Central African Republic Diagnostic Trade Integration Study under the Integrated Framework Concept Paper, at p.6.

²¹ Country profile, 2007, Nigeria, The economist intelligence unit, www.london.eiu.com.

²² Country profile, 2007, Senegal, The economist intelligence unit, www.london.eiu.com.

²³ Country profile, 2007, Côte d'Ivoire, The economist intelligence unit, www.london.eiu.com.

²⁴ ITC calculations based on COMTRADE and WTO statistics.

²⁵ World Bank, WDI 2005 online.

accounting for only about 0.5 per cent of world exports.²⁶ More than half of these exports have been destined for Europe, with about 77 per cent of these accruable to the transport and travel services. Tourism in particular has stimulated exports in these two sectors, particularly for countries like Malawi, Mauritius, Seychelles, Uganda and Rwanda. The same is true of transportation services for Kenya and Ethiopia. Because Europe imports more than 50 per cent of ESA countries' services, it is an important market for the ESA region. However, ESA countries comprise only a fraction of Europe's import sources, collectively providing only 6.6 per cent of Europe's services imports.²⁷ Overall, these countries remain net importers of services.

25. In the **Pacific region**, Fiji's services sector expanded by 1.9 per cent in 2004, with hotels and restaurants amongst other sub-sectors registering faster growth in response to record tourism levels. Visitor arrivals in 2004 were up by about 13 per cent from the 2003 level, led by an increase in Australian and New Zealand tourists responding to vigorous marketing, and the availability of low airfares following greater competition in airline services to the Fiji Islands.²⁸ In the period 2005-2007, the service sector was forecast to grow at annual rates of under 2 per cent, predicted to be the major contributor to aggregate growth in 2006-2007. The fastest-expanding sub-sectors were expected to be transport and communications, with modest strengthening in finance and business services, wholesale and retail trade, and hotels and restaurants. In tourism, visitor arrivals were projected to increase by 7.2 per cent in 2005 as the industry continued to benefit from airline deregulation with accommodation capacity expected to hit ceiling highs because of high visitor numbers.²⁹ Overall, the value of trade in services is growing at faster rates than that of trade in industrial products.³⁰ There is also a new dynamism in areas of internet trading, e-commerce, financial services, and outsourcing.

26. The service sector is a driving force in the **Caribbean economies**, covering exports ranging from over 75 per cent for a number of Caribbean countries, with the tourism sector accounting for one in every four jobs.³¹ Regional liberalisation of services is at a progressed level, allowing natural persons to move freely within the region under the Caricom Single Market and Economy, (CSME). However, opportunities for Caribbean operators to enter the EU market are considered marginal, as Caribbean firms cannot compete with EU firms.³²

²⁶ Commercial services, WTO SDB database on line.

²⁷ These figures reflect the picture of the EU -15.

²⁸ On line available www.asiandevbank.org.

²⁹ Ibid.

³⁰ Balasubramanyam, V. N., "Trade in Services in the Asia-Pacific", edited by Anne Kruger, Takatoshi Ito, NBER-East Asia seminar on economics, volume 11.

³¹ See Sustainability Impact Assessment of the EU-ACP Economic Partnership Agreements, Caribbean region: Tourism. On line available,

http://trade.ec.europa.eu/doclib/docs/2007/march/tradoc_133937.pdfwPA.

³² Ibid, at p.83.

27. The above exposé leads to a conclusion that the services sector is important for ACP countries. It also comes out clearly that these countries are net-importers of services, facing export capacity challenges, which need to be overcome in order for the services sector to contribute more to the economic growth and attainment of national development objectives in these countries.³³

4. TRACING THE EU-ACP RELATIONSHIP ON TRADE IN SERVICES: FROM LOMÉ TO COTONOU

28. The EU has had decades of a trade relationship with its former colonies; ACP countries. From the times of the Lomé Conventions signed in Togo in 1975, this relationship has focused mainly on trade in goods. At this point in time, in general, services were looked at as non-tradable, owing to their intangibility, difficulties in capturing this trade in national budgetary calculations such as terms of trade, or balance of payments statistics, and most importantly, the fact that services and their provision were looked at as something of the confines, and preserve, of the State, operating by and large in a monopoly situation, making envisaging tradability difficult. The biggest attempt at dealing with services aspects in the Lomé Conventions was in Title V which contained provisions relating to “*establishment and services*”, providing for *non-binding* national treatment of national and foreign companies from the contracting parties.³⁴

29. Subsequent Lomé Conventions that were amended and expanded, particularly the Lomé IV Convention, parts 1 and 2 signed in 1990 and 1995 respectively, covered services more extensively. In Title IX thereof, focus was on the development of services, with the objective, *inter alia*, to “*support ACP States’ efforts to increase their domestic capacity to provide services with a view to improving the working of their economies...*” The provisions specifically pointed out certain sectors such as tourism, transport and communications as priority. EU Member States committed themselves to implementing programmes to assist and enable ACP Member States develop their services capacities.

30. The emphasis of the Lomé Convention was on the *development of services capacity*, as opposed to *trading in services*. This emphasis mainstreamed issues of access and availability of services, in the domestic context, which, at the time, were mainly State provided. On the other hand, *trade in services* entails the involvement of private sector for commercial purposes, where services are bought and sold on competitive basis.

³³For further information on the implications of liberalizing services in the EPAs, see “Why inclusion of services in the EPA is problematic: legal and development implications”. South Centre Policy Brief no. 10. Online available, <http://www.southcentre.org>.

³⁴ Article 62, Chapter 1, Title V, Lomé Convention.

31. The conceptual difference between *development cooperation* and *trade* is an important one—because in many ways, it lies at the heart of understanding the rationale behind the EPA negotiations. Inherent in a relationship on the basis of *development cooperation* is the recognition, and acceptance, that the parties involved are at unequal footing, and that one (typically the donor), needs to assist the other (a developing country) with technical and financial resources to develop or strengthen capacity in a specific area. This has been the rationale behind a very old relationship between rich and poor countries. In the case of the relationship with the EU and ACP countries, sometimes this has been manifest in the preferential market access that ACP countries have been receiving to EU markets; an expression of hand-holding, aimed at assisting beneficiaries in participating more in export trade. In the case of *trade*, the starting point is that participants therein look at the *trade* relationship as mutually beneficial, in a situation where they both have goods and services that they would like to exchange commercially and competitively. The trade negotiation then focuses on how to best streamline this relationship amongst themselves. Equality and capacity are assumed.

32. In the Cotonou Partnership Agreement, (hereinafter referred to as the Cotonou Agreement), which currently governs the EU-ACP relationship, the EU made a categorical policy shift, moving not only to seeking trade market access reciprocity and WTO compatibility,³⁵ but also extending the scope of tradables to include services. The Cotonou Agreement runs until 2020, with the exception of the Trade Cooperation Chapter of the Agreement, which expires on 31 December 2007, and has to be replaced by Economic Partnership Agreements (EPAs) in order to be WTO compatible.³⁶

33. The focus of the Cotonou Agreement, although slightly on development of services capacity (such as in Article 41:5), is mainly on *trade* in services. In Article 41:4, the parties, (European Union and ACP) agree “...on the objective of extending under the EPAs, and after they have acquired some experience in applying Most Favored Nation (MFN) treatment under the GATS, their partnership to encompass liberalization of trade in services...” This agreement relates to the **objective of extending scope of the trade relationship, at a future point, to trade in services. It is not agreement to negotiate trade in services immediately.** As such, there should be no time-bound pressure to negotiate a trade Agreement that liberalizes services between European and ACP countries. What seems to be time-bound is the EU commitment in Article 41:3 of the Cotonou Agreement, to provide sympathetic consideration to the ACP countries’ priorities for improvements in the EC schedule of commitments, in the context of the GATS negotiations, currently underway in the Doha Round. Here, the EU commits to meeting ACP specific needs in the GATS negotiations. The EU also commits to supporting the ACP

³⁵ See Article 36 (1) and 37(1) Cotonou Partnership Agreement.

³⁶ See Article 95 (1), Cotonou Agreement for details on any post-Cotonou arrangement.

countries in strengthening their capacity in the supply of services.³⁷ Since the Doha Round presents an opportunity for implementation of the commitments that the EU has taken on in the Cotonou Agreement, ACP countries have merit in seeking a Doha outcome on this Cotonou mandate, through insisting that the EU opens up markets and make less national treatment restrictions in sectors and modes of export interest to ACP countries in the GATS negotiations, especially those relating to mode 4. In spite of all these provisions, the EU is taking a very aggressive and ambitious approach to the EPA negotiations, with the intent of concluding reciprocal and binding services trade Agreements with all six EPA negotiating regions by the end of 2007.

34. ACP countries are not under any legal obligation to negotiate EPAs on services with the EU. The WTO waiver covering Cotonou preferences, which was obtained in 2001 for a limited period of 7 years, (starting in November 2001, and expiring on 31 December 2007), provides legal cover from suits of MFN contravention, for the market access that the EU has traditionally given to ACP countries for their goods; agricultural and industrial. Because this waiver deals with trade in goods, its expiry only affects trade in goods. The EU and ACP do not have any preferential trade regime, be it on the basis of the Enabling Clause, waiver or other, that covers trade in services. Indeed, there is no Enabling Clause-like environment in the WTO covering trade in services, which is the reason why the LDC group in the WTO is seeking to develop such a legal instrument that allows developed countries, and developing ones declaring themselves in a position to do so, to give them special priority market access to services markets. Further, all the challenges of a dispute nature that the EU has faced for market access given to ACP countries by Brazil, Ecuador, Honduras, Guatemala, Mexico and others, relate to goods.³⁸ There is therefore no question of expiring waivers and compatibility issues in the area of trade in services. As such, the time pressure on ACP countries to conclude an EPA on services is misguided, and unnecessary.

35. In search for a WTO compatible outcome for the EU-ACP trade relationship, what is necessary is to bring the goods preferences in conformity with WTO non-discrimination rules, either through making them Enabling Clause compatible, or GATT Article XXIV compatible, all of which processes relate to trade in goods. The inclusion of services in the EPAs should therefore be

³⁷ Labour, business, distribution, finance, tourism, culture, construction and related engineering services are singled out as priority, with the aim of improving competitiveness.

³⁸ In 2002, Brazil, Thailand and Australia challenged the legality of the EU's sugar regime. The WTO Appellate Body ruled in favour of these countries, establishing that the EU export subsidies on sugar were illegal, see WT/DS265/AB/R 'European Communities – Export Subsidies on Sugar, Report of the Appellate Body, 2005, 28 April 2005. In 1995, Ecuador, Guatemala, Honduras, Mexico and the US filed a complaint before the WTO in 1996, alleging that the EU regime for importing bananas violated the GATT. The WTO panel ruled the EU's tariff quota allocation, particularly to the ACP countries, was contrary to the non-discrimination rule (Article 13 of the GATT) and ordered the EU's import regime to be amended. WT/DS27/AB/R 'European Communities – Regime for the Importation, Sale and Distribution of Bananas, 9 September 1997.

at the discretion of ACP countries, on the basis of their own national development priorities, and not because the Cotonou preferences waiver is expiring. Should the ACP countries decide to negotiate a services trade Agreement with the EU, as many indeed have, then the provisions of the GATS become relevant. Here below, the Fact Sheet takes a look at issues of WTO GATS compatibility.

5. WTO COMPATIBILITY AND SERVICES NEGOTIATIONS IN EPAs

36. Article V of the GATS contains the relevant provisions on formulation of economic integration Agreements (EIAs) in services. According to Article V (4), such EIAs shall not raise the overall level of barriers compared to levels applicable prior to the formation of the EIA. Article V lays out the criteria that must be met for EIAs to be WTO GATS compatible as follows:

- i) The EIA must have “substantial sectoral coverage” in terms of sectors, volume of trade affected and modes of service delivery, with no *a priori* exclusion of any mode of supply;
- ii) The EIA must provide for national treatment for service providers of Members eliminating “substantially” all discrimination through:
 - a) *Elimination of existing discriminatory measures, and/or;*
 - b) *Prohibition of new or more discriminatory measures.*

37. The complete elimination and prohibition of discriminatory measures must be effected either upon entry into force of the Agreement, or within a reasonable time-frame thereafter. There is flexibility under Article V: 3 in the fulfillment of the requirements in (i) and (ii), in cases where developing countries are parties to the EIA. In such cases, flexibility is provided for them, regarding the basic conditions, particularly concerning the absence or elimination of all discrimination in the sense of national treatment, taking into account the level of development of the countries concerned, both overall and in individual sectors and sub-sectors.

38. ACP countries can therefore cover fewer sectors, a lower volume of trade, or make commitments in fewer modes of supply, and enjoy a wider spectrum of limitations to national treatment when they engage in EIAs with developed countries, such as is the case in the EPAs.³⁹ In cases where the EIA involves *only* developing countries, further flexibility is provided, allowing for more favorable treatment to juridical persons (companies) owned or controlled by natural

³⁹ For further discussion, see UNCTAD, “Challenging conventional wisdom; development implications of trade in services liberalisation”, Trade, Poverty and Cross-Cutting Development Issues, Study Series no.2, March 2007. Online available <http://www.unctad.org>.

persons of the parties to such an Agreement.⁴⁰ In evaluating whether the basic conditions for an EIA are met, consideration may also be given to the relationship of the Agreement to a wider process of economic integration or trade liberalization among the countries concerned.

39. Article V of the GATS provides no benchmarks as to what constitutes proper fulfillment of the conditions set out for EIAs in services.⁴¹ Firstly, the limited statistics available on trade in services make it difficult for Members to quantify the breadth of sectoral coverage, and its volume. Some of the modes of supply, particularly mode 1, and mode 4 are very difficult to track, making it hard to capture substantial modal coverage. The footnote to Article V: 1 says that substantial sectoral coverage is understood in terms of number of sectors, volume of trade affected and modes of supply, without *a priori* exclusion of any mode of supply. However, it is not clear what number of sectors, in terms of percentages, needs to be covered, or constitutes substantial.

40. In spite of the Article V flexibilities for developing countries, in practical terms, they face a significant amount of pressure in EIAs negotiations, to liberalize widely in terms of sectoral and modal coverage. In the case of the EPAs for example, in the text that the EU has given to various ACP regional negotiating groups, only audio-visual services, national maritime cabotage, and air transport services, including domestic and international air transportation services, or those related to the exercise of traffic rights, are excluded. The necessary implication is that all the other of the WTO' 160 odd sectors (and sub-sectors) are open for negotiation and therefore inclusion. ACP countries would have to fight *tooth and nail* to ensure that their flexibilities in GATS Article V to open fewer sectors, and enjoy more national treatment limitations, are protected.

41. Services EIAs have to be notified to the WTO' CTS, which may establish a working party to examine that Agreement, reporting to the Council on its inconsistency⁴². The CTS may also forward the EIA to the Committee on Regional Trade Agreements (CRTA) to evaluate issues of consistency with Article V, making recommendations as appropriate, to the parties. In practice, all services EIA's are forwarded for examination to the CRTA. According to Article V: 7 (b), Members of an Article V EIA in services, which is implemented on the basis of a timeframe, must periodically report to the CTS on its implementation. The CTS can make recommendations on this process as it deems appropriate. A Member to such an EIA is estopped from seeking compensation for trade benefits that may accrue to any other Member from such an Agreement.⁴³ This means that ACP countries would not be able to claim compensation for benefit accruing to a third party (e.g. an American company having substantial business

⁴⁰ See Article V: 3 (b) of the GATS.

⁴¹ The WTO secretariat has summarized these in TN/RL/W/8/Rev.1, 1 August 2002.

⁴² See Article V: 7 (a).

⁴³ See Article V: 8.

operations in the EU), from the EPA. If, in developing the EIA, Members have to withdraw concessions from their schedules, they have got to compensate other WTO Members in line with the provisions of Article XXI on modification of schedules.⁴⁴

42. In spite of the detailed provisions on formation and notification, only 58 services EIAs have been notified to the WTO for examination. As such, most of them operate without any multilateral oversight. It may be due, in part, to the fact that many RTAs have services as a chapter and are not *exclusively* devoted to services. In such cases, the notification may fall under the General Agreement on Tariffs and Trade (GATT) Article XXIV processes and not Article V of GATS. There has been a call for a revision of Article V, particularly in paragraph 29 of the Doha Ministerial Declaration, wherein Ministers stressed the need for WTO Members to address those issues affecting the evaluation of compatibility with Article V, owing to ambiguity in clear meaning of the provisions. There were proposals in the WTO's CRTA, Committee on Trade in Goods (CTG), Committee on Trade and Development (CTD), and the CTS, to streamline notification processes for RTAs through use of a single document detailing provisions for Articles XXIV: 7 (a) of GATT, V: 7 (a) of GATS, and paragraph 4 (a) of the Enabling Clause.⁴⁵ A key feature of these proposals is that notification is simplified through a single sheet that covers all aspects of the RTA be it goods, or services. The CTG has adopted this proposal (on transparency in RTAs), and what remains outstanding is for the CTD, CTS, and CRTA to follow suit. While there are slips in notifications and multilateral oversight, because of the magnitude of the EPAs owing to the number of WTO Members involved in these negotiations, it is likely that other WTO Members will be interested in the details. As such, multilateral discussion and scrutiny is almost inevitable in this case. ACP countries should therefore be firm in sticking to the rules of forming EIAs, as the flexibilities for developing countries are quite favourable to them.

43. While ACP countries negotiate EPAs, they need to recall that they have many flexibilities in the GATS, which are still open for utilization. Consideration of how best these flexibilities can be used, and how their spirit and intent can remain alive through the outcome of the EPAs is very important. In retaining *coherence between GATS flexibilities and EPA negotiation outcomes*, ACP countries should bear in mind the provisions of Article 41:4 of the Cotonou Agreement, wherein, the EU committed itself to respecting the GATS provisions *relating to the participation of developing countries in liberalization Agreements*.⁴⁶ . This means that GATS provisions such as Article XIX on *progressive liberalization*, and Article IV on how the *increased participation of developing countries in international trade* can be

⁴⁴ See discussion on 2 (c) above on the binding nature of schedules and the difficult roll-back process.

⁴⁵ See WT/REG/16.

⁴⁶ See Article 41: 4, Cotonou Partnership Agreement.

facilitated should not be forgotten ⁴⁷ It is also worth noting that the GATS sanctifies the right of Members to regulate an issue that should not be tampered with even in the EPA negotiations.

6. PLACING TECHNICAL ASSISTANCE AND SUPPORT FOR CAPACITY BUILDING IN THE EPAS

44. ACP countries face a major problem of capacity not only to supply services domestically and for export, but also to effectively regulate the operation of liberalised sectors. As such, the discussion on technical assistance and capacity building, in terms of how ACP countries can tap this within the EPA negotiations becomes important.

45. The development cooperation chapters of the Cotonou Agreement are largely untapped. Since they remain in operation until 2020, there is unlimited scope for ACP countries to rely on these provisions in seeking technical assistance and support for capacity building, to develop competitiveness and efficiency in their services sectors, as well as develop and strengthen national policy, institutional capacity, regulatory reform, skilled human resource, and the entire administrative support structure that is necessary if ACP countries are to effectively compete and take advantage of market openings that may arise from EPAs, or even multilateral liberalisation in any services sector. ⁴⁸

46. In Article 22:1 (b) (iv) of the Cotonou Agreement, the EU commits itself to support ACP efforts to improve the quality of private and public services. In Article 23 (e) of the same, the EU commits itself to support sustainable policy and institutional reforms and the investments necessary for equitable access to economic activities and productive resources particularly *economic and technological infrastructure and services, including transport systems, communications services and the development of information society*. In Article 24, the EU commits itself to support sustainable development of the tourism sector in ACP countries, including the legal and institutional framework and resources for the development and implementation of sustainable tourism policies and programs, and improving competitiveness especially of small and medium size enterprises. These are just some of the many provisions embedded in the Cotonou Agreement

⁴⁷ Examples given include through developed countries strengthening domestic services capacity of developing countries, improving the latter's access to distribution channels and information networks, and the liberalization of market access in sectors and modes of supply of export interest to developing countries. In terms of accessing these benefits, special priority is given to LDCs.

⁴⁸ Development finance and technical assistance, currently available under the European Development Fund (EDF) through the Regional Indicative Programmes (RIPs) and the National Indicative Programmes (NIPs) will still be provided to ACP countries. S. Bilal, and F. Rampa (2006) 'Alternative to EPAs: Possible Scenarios for the Future ACP Trade Relations with the EU', Maastricht: ECDPM, Policy Management Report 11. p.17.

that ACP countries can actively utilise, as a basis for the tabling of projects and proposals for funding to undertake various activities aimed at developing capacity and building competitiveness of the service sector.

7. CONCLUSION

47. In order for ACP trade negotiators to effectively engage in the EPA negotiations, they need to understand the rules, principles and concepts that govern multilateral trade, and economic integration Agreements in services. Mastering the above rules, principles and concepts is inescapable.

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READERSHIP SURVEY QUESTIONNAIRE
South Centre Analytical Note

DEMYSTIFYING TRADE IN SERVICES: A STRATEGIC GUIDE FOR ACP EPA
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